**Manufacturers Woodworking Association of Greater New York Incorporated *and* Peterson Geller Spurge, Inc. and Patella Manufacturing, Inc.** Case 2–CA–35702

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 12, 2005, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel and the Charging Parties each filed exceptions and a supporting brief. The Respondent filed an answering brief. The Charging Parties filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions consistent with the discussion below, and to adopt the recommended Order.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by filing a Demand for Arbitration to compel the Union (New York City District Council of Carpenters) to enforce article I, section 7 of the parties' collective-bargaining agreement. The theory of the complaint is that by filing the arbitration demand, the Respondent sought to use the parties' grievance and arbitration procedures to "obtain an unlawful objective" and to "cause the Union to require employees to engage in an illegal and unprotected strike or job action." The judge found that the Respondent did not violate Section 8(a)(1) as alleged. We agree with the judge that the complaint should be dismissed, but we do so for the following reasons.

## I. BACKGROUND

### *A. Facts*

Manufacturers Woodworking Association (MWA), the Respondent, is a multiemployer bargaining group whose companies manufacture and install woodwork, such as judges' benches, fine paneling, and cabinets.

The Respondent and the Union are parties to a collective-bargaining agreement, effective July 8, 2002 through June 30, 2007. On July 8, 2002, the parties executed a Memorandum of Understanding which adds as article I, section 7, the following provision (the clause):

> The Union shall monitor all woodwork installed within its jurisdiction and confirm that said woodwork was manufactured by a shop, which either is a signatory to this agreement or in the alternative manufactured by a shop that is paying equal to or better than the wages and fringe benefits provided for in this agreement. The Union shall not allow the installation by any of its members of any woodwork, which is identified as not being furnished and/or manufactured by a signatory to this agreement or in the alternative which is not furnished and/or manufactured by a shop that is paying equal to or better than the wages and fringe benefits provided for in this agreement subject to applicable law.

Several witnesses testified that the purpose of the clause was the preservation of bargaining unit work.[2]

The Charging Parties are woodwork manufacturers who have a collective-bargaining agreement with a different local union (Local 42 of the United Brotherhood of Carpenters and Joiners). The Charging Parties do not install the woodwork they manufacture, but instead subcontract their installation work to Installation Contractors who have a collective-bargaining relationship with the Union and are signatory to an agreement similar to the MWA-District Council collective-bargaining agreement, but without the clause in question. Because the collective-bargaining agreement between Local 42 and the Charging Parties provides for lower wages than the MWA-District Council contract, the Union could not, under the clause, allow its members employed by any Installation Contractor to install the woodwork manufactured by the Charging Parties.

By letter dated December 9, 2002, the Respondent notified the Union that MWA members had lost work on 21 projects to shops outside the Union's jurisdiction. The Respondent reminded the Union of its contractual responsibility to prohibit the installation of woodwork that does not meet the contract's requirements. The letter stated that the Union would be in breach of the collec-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Chairman of MWA's negotiating committee testified that the purpose of the clause, as stated at the bargaining table, was to "preserve the jobs in New York." Other witnesses testified similarly that the purpose of the clause was to "preserve the work that was traditionally done by local manufacturing and installation shops" and to "preserv[e] the manufacturing and installation of architectural millwork."

tive-bargaining agreement if it did not meet its obligations, and that any action other than prohibiting the installation of unsanctioned woodwork would constitute a breach of the collective-bargaining agreement.

On April 25, 2003, the Respondent filed a Demand for Arbitration, alleging that the Union breached article I, section 7 of the July 8, 2002 Memorandum of Understanding. On July 31, 2003, the Respondent withdrew its request for arbitration. The parties stipulated that if enforcement of the clause is found to be lawful, the Respondent intends to seek its enforcement.

When asked what the Union would do if the clause were found to be enforceable, Union President Peter Thomassen testified:

> [W]hat we would do if the language was enforceable, I would have to say at this point it would be speculative. But I would have to say that we would try and do . . . would be a learning curve. . . . [W]e would have to sit down with the MWA and also other shops that are outside of the New York City area, and start to make them understand that we have language that's enforceable and hopefully sit down across a table from each other and work this out, so there isn't any work stoppages or anything of that nature.

Thomassen further testified that "where we have men on the job" and there is nonunion product brought in, "we cannot instruct the members not to handle it. That is up to the individuals. They have to decide on their own if they want to handle the material or not." When asked if he would instruct his union members to stop work, he stated, "every situation would be different. I would be lying to you if I said it never would come into my realm. . . . If everything else was not working and I could not get a meeting and couldn't get anybody's response, I might at one point have to ask the carpenters not to install a produc[t]. It would be on them if they wanted to do it or not." Thomassen acknowledged that there are internal mechanisms for bringing members who cross union picket lines up on charges.

### *B. Judge's Findings*

Because the complaint does not allege a Section 8(e) violation, the judge found it unnecessary to decide whether, as contended by the Respondent, the clause is a lawful work preservation provision pursuant to *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967).

The judge credited Thomassen's testimony that if the clause were found to be enforceable, the Union would "sit down across a table" with the shops and "work this out, so there isn't any work stoppages or anything of that nature" and that members have to "decide on their own if they want to handle" material which is not manufactured in their shops. The judge therefore found that the General Counsel "made no showing that the Union intends to obtain an 'unlawful objective' or to engage in a work stoppage." Accordingly, he recommended that the complaint be dismissed.

### *C. Contentions of the Parties*

#### 1. General Counsel

The General Counsel alleges that the Respondent violated Section 8(a)(1) by seeking to enforce the clause through arbitration, because enforcement of the clause had the unlawful objective of causing the Union to induce a work stoppage that would violate Section 8(b)(4)(B) of the Act. The General Counsel argues that the clause restrains the Section 7 rights of employees of installation contractors because it requires the Union to force employee members employed by those contractors to participate in an 8(b)(4)(B) strike, or to shut down jobs to prevent its members from installing unsanctioned manufactured woodwork.

The General Counsel reasons that if an installation contractor employing employees represented by the Union attempts to install woodwork products prohibited by the clause, the clause requires the Union to cause its members to engage in an 8(b)(4)(B) work stoppage.[3] The enforcement of the clause would require the Union to prevent its members from working for a neutral third party installer simply because that installer was handling nonsanctioned woodwork. The General Counsel contends that this would not be a protected primary work stoppage because the Union has no dispute with the installation contractor. Rather, the dispute is with the manufacturer of the unsanctioned woodwork. Because the installation contractor is a neutral to the primary dispute, any pressure on that contractor would be secondary. The General Counsel maintains that because the arbitration seeks to require the Union to cause an unlawful secondary strike, and to violate Section 8(b)(1)(A) by requiring its members to engage in an 8(b)(4)(B) strike, the arbitration seeks an unlawful objective. The General Counsel claims that because the arbitration seeks an unlawful objective, it may be enjoined under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983).[4]

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[3] However, the General Counsel asserts that the clause does not violate Sec. 8(e) because its obligations run to the Union rather than to the signatory employers.

[4] The *Bill Johnson's* principles have been applied to arbitration actions. See, e.g., *Service Employees Local 32B-32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995).

The General Counsel further maintains that the arbitration demand would interfere with employees' Section 7 rights because it would directly result in the Union's imposing discipline on member employees to compel them to participate in an unprotected strike. Therefore, the General Counsel contends that the Respondent's pursuit of arbitration violates Section 8(a)(1).

2. Charging Parties

The Charging Parties similarly argue that to comply with the clause, the Union, in violation of the Act, would have to prevent its members who work for installation contractors from installing woodwork that does not comply with the clause. Such an action would bring unlawful pressure on both the installation contractors and the general contractors who assign manufacturing work to employers such as the Charging Parties. Such pressure would constitute unlawful secondary activity in violation of Section 8(b)(4), and the Respondent's enforcement efforts that seek to compel such unlawful pressure would violate Section 8(a)(1).[5]

The Charging Parties further maintain that the Respondent's filing of its arbitration demand to compel the Union to enforce the clause violates the Act because, "if successful, Union enforcement of the Clause necessarily will 'interfere with, restrain, or coerce' employees of Installation Contractors, compelling them to refuse to install the [n]on-compliant [w]oodwork, thereby inhibiting their Section 7 right to refrain from such a concerted work stoppage." CP brief 9.

3. The Respondent

The Respondent maintains that there is no evidence "that the Respondent's request for arbitration has an unlawful secondary and, therefore, illegal objective." R. brief 19. The Respondent's "intention in requesting arbitration was only to determine whether the Union had properly implemented the Clause," and "[n]othing contained in the Clause would serve to prohibit" union members from handling the products of any company such as the Charging Parties who manufacture unsanctioned woodwork. R. brief 20. The Respondent further argues that because the arbitration was withdrawn, the judge properly "decided not to determine the hypothetical question whether a victorious arbitration award would yield an illegal objective." (R. brief 21).

The Respondent claims that its December 9 letter discussed above should not be relied upon as evidence of the Union's plans with respect to enforcement of the clause because the letter was written by the Respondent's counsel, not by an agent of the Union. (R. brief 22). Rather, the Respondent argues that the "testimony demonstrates that enforcement of the Clause would not necessarily result in a work stoppage, strike or use of internal mechanisms to discipline a member." R. brief 29. Accordingly, the Respondent argues that the judge properly dismissed the complaint.[6]

II. ANALYSIS

As set forth above, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by filing a Demand for Arbitration to compel the Union to enforce article I, section 7 of the parties' collective-bargaining agreement, because by filing the arbitration demand, the Respondent sought to use the parties' grievance and arbitration procedures to "obtain an unlawful objective" and to "cause the Union to require employees to engage in an illegal and unprotected strike or job action."

Under *Bill Johnson's Restaurants*, supra, 461 U.S. 731, as a general rule a lawsuit enjoys special protection and can be condemned as an unfair labor practice only if it is filed with a retaliatory motive, i.e., motivated by a desire to retaliate against the exercise of a Section 7 right, and if it has no reasonable basis in fact or law. However, a lawsuit that is aimed at achieving an "unlawful objective" (or is preempted) "enjoys no special protection" under *Bill Johnson's* and may be enjoined. See *Bill Johnson's*, *supra*, 461 U.S. at 747 fn. 5.[7] A lawsuit filed with an unlawful objective can be condemned as an unfair labor practice "[i]f it is unlawful under traditional NLRA principles." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). Under traditional NLRA principles, a violation of Section 8(a)(1) is established if it is shown that the employer's conduct has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

[5] In support, the Charging Parties rely on *NLRB v. Enterprise Assn. of Steam Pipefitters*, 429 U.S. 507 (1977), where the Supreme Court upheld the Board's "control" test, under which a union commits an unfair labor practice under Sec. 8(b)(4)(B) when it "employs a product boycott to claim work that the immediate employer is not in a position to award." Because the installation contractors do not control the work, the Charging Parties contend that any pressure by the Union on those contractors would violate Sec. 8(b)(4)(B) under *Enterprise*.

[6] The Respondent also argues that the exceptions and briefs of the General Counsel and Charging Parties fail to meet the requirements of Section 102.46 of the Board's Rules. We find no merit to this claim. The exceptions and briefs substantially comply with the Board's rules and regulations.

[7] The Supreme Court's decision in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002), "did not affect the footnote 5 exemption in *Bill Johnson's*." *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB No. 103, slip op. at 4 fn. 4 (2004), citing *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

As set forth above, the *Bill Johnson's* principles apply to arbitrations as well as lawsuits. *Service Employees Local 32B-32J v. NLRB*, supra, 68 F.3d at 495.

*NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). "In determining whether an employer's [conduct] violates Section 8(a)(1), the Board considers the 'totality of the relevant circumstances.'" *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).

In deciding this case, we assume arguendo that the Respondent's arbitration demand had the unlawful objective of requiring the Union and its members to engage in a work stoppage that would violate Section 8(b)(4)(B), and that therefore, the arbitration demand lost its special protections.[8] Considering the totality of the relevant circumstances, however, we conclude that the General Counsel has failed to show, by a preponderance of the evidence, that the mere filing of the arbitration demand had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Thus, it is far from clear that an unlawful work stoppage would inevitably result from the arbitration proceeding initiated by the Respondent or that the Union would ultimately resort to the use of internal disciplinary procedures to compel employee participation in that unlawful strike. Several considerations persuade us that the arbitration demand, standing alone, had little or no effect on employee rights.

First, it is certainly possible that in the arbitration proceeding initiated by the Respondent the Union could take the position that it would not, and could not lawfully be ordered to, compel its members to participate in an unlawful strike. If that occurred, and if the argument prevailed, employees would not reasonably fear that the Union would resort to internal discipline to force its members to participate in an unlawful work stoppage.

Second, even if the arbitration proceeding results in an order requiring the Union to "not allow the installation" of noncompliant woodwork, interference with employee Section 7 rights would not necessarily ensue. The Union could choose to take action short of requiring employees, under penalty of internal union discipline, to engage in an unlawful strike. For example, the Union could choose to approach the Charging Parties and request that they pay equal wages and benefits to their employees and thereby make their woodwork compliant with the clause. If the Charging Parties were to agree to do so, no resort to an unlawful work stoppage would be necessary and employees would not reasonably be coerced in the exercise of their Section 7 rights.

Third, even if the Charging Parties do not agree to match the contractual wages and benefits of the MWA contract with the Union, the Union could still decide not to resort to forcing its members, through internal union discipline, to participate in an unlawful work stoppage. Rather, the Union could lawfully opt to approach individual members and advise them that it is their decision whether or not to install noncompliant woodwork.[9] If the members decide on their own not to handle the noncompliant woodwork, without being compelled to do so under threat of union discipline, employees would not reasonably be coerced in the exercise of their Section 7 rights.[10]

Thus, there would be no link between the Respondent's filing of the arbitration demand and interference with employees' Section 7 rights unless each of the following conditions occurs:

- The arbitrator orders the Union to "not allow installation by any of its members of any [prohibited] woodwork."
- The Charging Parties continue to refuse to pay contractual wages and benefits.
- The Union's members nevertheless decide to install the Charging Parties' noncompliant woodwork.
- The Union threatens its members or resorts to internal discipline to compel its members to participate in an unlawful work stoppage.

There are too many uncertainties and contingencies in this scenario to support a finding that the mere filing of an arbitration demand would reasonably instill in employees a fear of forced participation in a future unlawful work stoppage. Under these circumstances, any "nexus" between the Respondent's filing of the arbitration demand and the "likely impact on employee protected rights is simply too attenuated to remove it from the realm of pure speculation."[11] While some future inter-

[8] In light of our assumption for the purposes of discussion that any work stoppage resulting from enforcement of the clause would violate Sec. 8(b)(4)(B), we find it unnecessary to pass on the question whether the clause was a valid work preservation clause. Under *Enterprise*, supra, 429 U.S. at 518, secondary activity proscribed by Sec. 8(b)(4)(B) cannot be legitimized even by a valid work preservation provision in the parties' collective-bargaining agreement.

[9] See *Building & Construction Trades Council of Tampa and Vicinity Local 397 (Tampa Sand and Material Co.)*, 132 NLRB 1564, 1565–1566 (1961) (statements by union agents that "men could make an individual choice" as to handling of products does not constitute "inducement and encouragement" within the meaning of Section 8(b)(4)).

[10] The above scenarios, under which the arbitration proceeding would not reasonably interfere with the Sec. 7 rights of employees, are illustrative only. We do not find that these are the only lawful actions that may be taken by the Union as a result of arbitration. We have only included them as support for our finding that the arbitration proceeding initiated by the Respondent would not reasonably tend to interfere with employees' Sec. 7 rights.

[11] *Slate Workers Local 66 (Sierra Employees Assn.)*, 267 NLRB 601, 602–603 fn. 10 (1983).

ference with employee Section 7 rights is theoretically possible as a result of the arbitration, it is far too speculative to warrant a finding that the filing of the arbitration demand, standing alone, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Because the impact of the arbitration demand on employee Section 7 rights is so attenuated, we cannot find that it is "unlawful under traditional NLRB principles."[12] For these reasons, we conclude that the Respondent did not violate Section 8(a)(1) of the Act by filing its demand for arbitration.[13] Accordingly, we shall dismiss the complaint.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Karen Newman, Esq.* for the General Counsel.
*Denise Forte, Esq.* and *Scott Trivella, Esq.* for the Respondent.
*Merril Mironer, Esq.* for the Charging Parties.
*Gary Rothman, Esq.* for the Union.

[12] *Rite-Aid*, supra, 305 NLRB at 835.

[13] In recommending that the complaint be dismissed, the judge relied on the testimony presented by the Union that it did not intend to engage in a work stoppage. Unlike the judge, we do not find this testimony to be determinative, because the test for a Sec. 8(a)(1) violation is an objective one. *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981). Although the actual intention of the Union is not determinative, we find that the Union's testimony that it did not intend to engage in a work stoppage, but would instead first attempt to take other action to enforce the clause, supports our finding that an unlawful strike compelled by the Union would not necessarily or inevitably occur as a result of the arbitration action.

The Union's admission that if other avenues were unsuccessful, it might have to ask its members not to install a product, does not compel a different result. That an unlawful strike could conceivably occur in the future after other avenues have been exhausted is, as discussed above, insufficient to support a finding that the mere filing of the arbitration demand would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

## DECISION

### STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York, New York on September 27, 2004. Upon a charge filed on August 8, 2003, a complaint was issued on March 30, 2004, alleging that Manufacturers Woodworking Association of Greater New York Incorporated (Respondent or MWA) violated Section 8(a)(1) of the National Labor Relations Act, (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the parties on November 29, 2004.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is an organization composed of various employers engaged in installation and woodworking manufacturing. It represents its members in negotiating and administering collective-bargaining agreements with labor organizations, including NYC District Council, UBCJA (the Union). Respondent has admitted, and I so find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICE

##### *A. The Facts*

###### 1. Background

MWA is a multiemployer bargaining group. The employer companies are in the business of the manufacture and installation of woodwork, such as judges' benches, fine paneling and cabinets.

Respondent and the Union are parties to a collective-bargaining agreement, effective July 8, 2002 through June 30, 2007. The parties' Memorandum of Understanding, executed on July 8, 2002 and effective through June 30, 2007, includes as article I, section 7, a provision (the Clause), which reads, in pertinent part:

> The Union shall not allow the installation by any of its members of any woodwork, which is identified as not being furnished and/or manufactured by a signatory to this agreement or in the alternative which is not furnished and/or manufactured by a shop that is paying equal to or better than wages and fringe benefits provided for in this agreement subject to applicable law.

By letter dated December 9, 2002, MWA notified the Union that MWA members had lost work on 21 projects to shops outside the Union's jurisdiction. Respondent reminded the Union of its contractual responsibility to prohibit the installation of woodwork that does not meet the contract's requirements. The

letter stated that the Union would be in breach of the collective-bargaining agreement if it did not meet its obligations.

On April 25, 2003 Respondent filed a Demand for Arbitration, alleging a breach of article I, section 7 of the July 8, 2002 Memorandum of Understanding. On July 31, 2003 Respondent withdrew its request for arbitration. The parties stipulated that if the Clause is found to be lawful, MWA intends to seek its enforcement.

2. Testimony of witnesses

Peter Thomassen, the president of the Union, testified that during the last several years Union membership had decreased by approximately 40 percent. He testified that the intention of the Clause was to "stem the ongoing problem of having our shops . . . going out of business." When asked what the Union would do if the Clause were found to be enforceable, he testified:

> [W]hat we would do if the language was enforceable, I would have to say at this point it would be speculative. But I would have to say that we would try and do . . . would be a learning curve. . . . We would have to sit down with the MWA and also other shops that are outside of the New York City area, and start to make them understand that we have language that's enforceable and hopefully sit down across a table from each other and work this out, so there isn't any work stoppages or anything of that nature.

Thomassen further testified, "where we have men on the job" and a product is brought in which wasn't manufactured in one of their shops, "we cannot instruct the members not to handle it. That is up to the individuals. They have to decide on their own if they want to handle the material or not."

Thomas Spurge, vice-president of one of the Charging Parties, was called as a witness by General Counsel. He was asked what would happen if the Clause were enforced. He testified, "We don't have any idea what the enforcement of the clause would mean."

Paul Ignelzi is president of Ignelzi Interiors, a manufacturer and installer of woodworking products. He was chairman of the negotiating committee on behalf of MWA. He testified that the purpose of the Clause, as stated at the bargaining table, was to "preserve the jobs in New York." Edmund Greco, president of Midhattan Woodworking Corp., testified that his company manufactures and installs architectural woodwork. He testified that the purpose of the Clause was to "preserve the work that was traditionally done by local manufacturing and installation shops." Scott Trivella, counsel to MWA, testified that the purpose of the Clause, as stated at the bargaining sessions, was to "preserv[e] the manufacturing and installation of architectural millwork."

All of the witnesses appeared to me to be credible. They testified in a forthright manner and their testimony was not contradicted. In addition, their testimony appeared to me to be plausible. Based on these factors and the witnesses' general demeanor, I credit the testimony of each of them.

*B. Discussion and Conclusions*

1. Work preservation

Pursuant to *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 639 (1967), Respondent argues that the Clause is a lawful work preservation clause and is not prohibited by Section 8(e) of the Act. The complaint does not allege a Section 8(e) violation. Inasmuch as General Counsel concedes that the Clause does not violate Section 8(e), I believe that it is unnecessary for me to decide whether, in fact, the Clause is a lawful work preservation provision.

2. Alleged unfair labor practice

On April 25, 2003 Respondent filed a Demand for Arbitration to compel the Union to enforce the Clause. Paragraphs 6(b) and (c) of the complaint allege that by so doing Respondent sought to "obtain an unlawful objective" and sought to "cause the Union to require employees to engage in an illegal and unprotected strike or job action." As General Counsel stated in her opening statement, enforcement of the Clause would require the Union to induce a "work stoppage in violation of Section 8(b)(4)(B)."

Thomassen testified that if the Clause were found to be enforceable, the Union would "sit down across a table" with the shops and "work this out, so there isn't any work stoppages or anything of that nature." Thomassen also testified that members have to "decide on their own if they want to handle" material which is not manufactured in their shops. Spurge testified that "we don't have any idea" what enforcement of the Clause would entail.

As stated earlier, I credit the testimony of Thomassen and Spurge. It is well-settled that the "burden of establishing every element of a violation under the Act is on the General Counsel." *Iron Workers Local* 386, 325 NLRB 748, 756 (1998). General Counsel has made no showing that the Union intends to obtain an "unlawful objective" or to engage in a work stoppage. See *Local 12, Operating Engineers (Cal Tram Rebuilders*), 267 NLRB 272, 275 (1983). Accordingly, the allegation is dismissed.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[1]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 12, 2005.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.